

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

FLEMING COMPANIES, INC.

Employer
and

Case 20-UC-380

TEAMSTERS LOCAL 150, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant of the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is an Oklahoma corporation with a warehouse facility located in West Sacramento, California where it is engaged in the non-retail sale of food and other grocery items. During the 12-month period preceding the hearing, the Employer purchased and received at its West Sacramento facility goods valued in excess of \$50,000 directly from points located outside the State of California. Based on the parties' stipulation to such facts, it is

concluded that the Employer is engaged in commerce and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Petitioner herein, also called the Union, is a labor organization within the meaning of the Act.

4. Under the language of its most recent collective-bargaining agreement with the Employer, effective July 1, 1997, through June 30, 2001, the Union represents a unit comprised of all clerical employees employed by the Employer at its West Sacramento, California facility that perform work within the jurisdiction of the Union pursuant to Board Case No. 20-RC-9482; excluding guards, professional employees, confidential secretaries and supervisors as defined in the Act. The Union was originally certified in 1970 by the Board as the exclusive bargaining representative of the clerical employees of the Employer's predecessor, Bert McDowell Company, a subsidiary of United Grocers (herein called United Grocers). The United Grocers' unit was certified in Case 20-RC-9482 on September 14, 1970, as follows:

All office clerical employees of the Employer at its 1801 Fruitridge Road, Sacramento, California location; excepting only: (a) executive, administrative, supervisory or professional employees, including but not limited to the general manager, secretary to the general manager, office manager, assistant office manager, credit manager, department manager, tire department mgr., tire dept. clerk, frozen food dept., mngr., delicatessen dept. mngr., meat dept. supervisors, non-food dept supervisors, data processing mgr., data processing house supervisors and dispatchers; (b) sales employees, including contact men; (c) persons working in positions involving confidential relations with management; (d) persons working under the jurisdiction of an agreement between the company and some other union; and (e) guards and supervisors as defined in the Act.

The Employer has had a collective-bargaining relationship with the Union since 1983 when it purchased United Grocers and assumed the United Grocers' collective-bargaining agreements with the Union, which covered the office clerical unit at issue herein and a separate unit of loaders and drivers.

The Union seeks to clarify the office clerical unit to include 13 employees in 10 different classifications. These thirteen employees consist of seven employees in the Employer's category marketing/procurement department: Merchandising Clerks Nancy Bertolozzi, Charmen Cardenas, Cheryl Farrow and Alex Silva; Merchandising Secretary Barbara Vela; senior Category Marketing Secretary Doris Bertram; and Control Label Secretary Jua Xiong. The other six employees the Union seeks to include in the unit are J.R. Ross, a Big T/VK Secretary in the voluntary marketing department; Trish Flanagan, an advertising clerk in the voluntary marketing department; Pam Grappo, the Bakery/Deli department coordinator; Karla Maze, a retail pricing coordinator in the retail pricing department; Shelli Porterfield a retail services coordinator in the retail technical services department; and Mechele Busby, an administrative assistant in the meat department.

The Employer contends that the unit clarification petition is untimely and that the Union has waived its right to pursue this petition by its prior conduct. The Employer further contends that the employees at issue do not share a sufficient community of interest with the bargaining unit employees to warrant a finding that they constitute an accretion to the existing unit. The Employer also contends that Nancy Bertolozzi is a statutory supervisor who must be excluded from the unit, and that Barbara Vela is a

confidential employee who must also be excluded from the unit. The Union takes the opposite view.

The Employer's Operation. At its West Sacramento facility, the Employer purchases, markets and distributes a wide variety of grocery products and general merchandise and also provides retail customers with related products and services in Northern California. Two other Employer facilities located at Tracy and Fresno, California, operate in conjunction with the West Sacramento facility to service Northern California.

The Employer's West Sacramento facility has three structures: a two-story office building adjoining a distribution center/warehouse and a truck maintenance facility located about 30 yards away. The Employer's operations are divided into several departments which are responsible for sales and marketing functions. These include a meat department, a bakery/deli department, a category marketing/procurement department, and a voluntary groups department.¹ These departments are under the overall supervision of Sales and Marketing Director Byron Lovell and are individually supervised by Meat Operations Manager John Clemens, Deli/Bakery Operations Manager Linda Grinder, Category Marketing/Procurement Manager Steve Peterson and Voluntary/IGA Marketing Director Mike Tolley.

The Employer also has a separate division at the West Sacramento facility called Direct Customer Service/Distribution that is headed by Manager Chris Dolder. Under this division is the human resources department, headed by Human Resource Manager

¹ The voluntary groups department services three grocery retail chains, Big T, Value King and IGA, providing them with support and sales services.

Jim O’Bra, that services the Employer’s West Sacramento, Tracy and Fresno locations; a transportation department under Transportation Manager Rick Clark; a warehouse department under Warehouse Manager Chuck Terragno; an accounting department headed by Accounting Manager Cres Watson; and an Information Technology (herein called IT) department headed by Manager Craig O’Noines.

In addition, there are other departments at the West Sacramento facility that assist retail stores with the management of their facilities and the pricing of their products for sale. These departments are called the store planning department headed by Store Planning Manager Bob Gardner; the retail pricing department headed by Retail Pricing Manager Danny Tafoya; and the retail technical services department headed by the Retail Technical Service Manager Quentin Dees. These departments are collectively referred to as “corporate” functions.

Bargaining History. In the early 1980’s, there were approximately 33 employees in the United Grocers’ clerical bargaining unit which was then located on Fruitridge Road in Sacramento. The unit included accounts receivable clerks, accounts payable clerks, order clerks, receptionists and various types of machine operators. In addition, the unit also included 5 buying department clerks (one for grocery, one for deli, one for meat and one lead clerk). However, in 1981, United Grocers moved its buying department to Pleasanton, California, and gradually eliminated all of the buying department positions at its Fruitridge Road location.

As indicated above, the Employer acquired United Grocers in approximately 1983 and assumed its collective-bargaining agreements with the Union. In 1984, the Employer moved its Fruitridge Road operations to its present facility on Channel Drive in West Sacramento.

In 1992, the Employer closed its Pleasanton, California facility which had housed its Western Region Management and merchandising functions and moved these operations to Milpitas, California. Beginning in 1992, the Employer re-modeled and greatly expanded its two-story office facility in West Sacramento. Office staff at the West Sacramento facility were moved into a temporary trailer during the remodeling which was completed in February 1993.

About October 1, 1992, the Employer closed its Milpitas facility, and began transferring its purchasing, product supply, accounting, human resources, customer service, and marketing functions to its West Sacramento location. After the remodeling was completed at West Sacramento in about February 1993, several employees who had previously worked at the Milpitas and Pleasanton facilities, including employees in the merchandising and purchasing departments, were transferred to the West Sacramento location. A few months prior to the hearing in this case in 1998, the merchandising and purchasing departments were consolidated into what is currently referred to as the category marketing/procurement department. Most of the classifications the Union seeks to add to the unit in this case (i.e., those now in the category marketing/procurement department) were first introduced into the West Sacramento facility beginning in

February 1993, with the transfer of the above-described employees from the Pleasanton and Milpitas facilities.

In the summer of 1992, the parties completed negotiations for a new collective-bargaining agreement that was ratified in July 1992, and executed in November, 1992. The question as to whether the positions involved in this proceeding should be included in the office clerical unit at West Sacramento was first raised by the Union in September, 1992. In a letter to the Employer dated September 28, 1992, Union Business Agent Dave Lowman stated:

Recently in your office we discussed the consolidation of the Milpitas Division to the Sacramento Office Clerical. You advised me that it was your intent to bring several new positions to the Sacramento office as non-union positions. . . The purpose of this letter is to officially state the position of Local 150, . . . that only guards, professional employees, confidential secretaries and supervisors are exempt from the bargaining unit. . . If it is your position to bring these jobs to Sacramento outside of the bargaining unit it will generate an immediate dispute by Local No. 150. . . . Please send me a list of all new jobs, complete with job description, that you intend to transfer to the Sacramento office^{2/}

As indicated above, in November, 1992, the parties executed a collective-bargaining agreement effective by its terms for the period July 1, 1992, through June 30, 1997. Notwithstanding the Union's September 28, 1992 letter, the Employer declined to

^{2/} Lowman testified that at about the time he wrote this letter, he obtained a phone listing for employees that showed the new employees. The record contains a copy of this document which includes the names of employees from the grocery department; perishables department; control labeling; "divertinhg," (sic), retail pricing and military departments. Included on the list were 4 purchasing secretaries (now called merchandising clerks); a retail pricing coordinator; a control labeling secretary; two secretaries in the grocery department; and one secretary (Nancy Bertolozzi) in the perishables department.

recognize the Union as the representative for any of the transferred employees except for the military clerks. The terms of the 1992-1997 collective-bargaining agreement were apparently applied only to the military clerks and not to any of the other Milpitas/Pleasanton transferees. ^{3/}

On March 29, 1993, Business Agent Lowman filed a grievance alleging that the Employer was assigning bargaining unit work to non-bargaining unit employees in violation of several sections of the collective-bargaining agreement. The letter accompanying this grievance stated as follows:

In September of 1992 a certified letter was sent to [the Employer] explaining the position of Local 150 with regards to bargaining unit work in the Sacramento clerical unit . . . In this letter a request was made for a list of all new jobs complete with job descriptions. I have not received this information, however, I was able to obtain a listing of the Merchandising Department complete with names and job titles. . . I find it very curious that only the Military Secretarial Personnel are in the bargaining unit, and that there has been no notification to Local 150 of these other new hires as required in Section 2.1 of the Agreement. . . Section 21 “New or Changed Job Classification” also requires the company to notify the union of new positions and to bargain rates of pay for new jobs. This also was not done! . . .

By letter dated June 17, 1993, the Union demanded jurisdiction over all clerical positions located at the West Sacramento facility. In this letter, the Union again requested information pertaining to the job descriptions, duties, wages and hours of work for all clericals at the facility.

The Employer, by letter dated July 1, 1993, responded to the Union's claims as follows: "We have, in our previous discussions, been clear that certain positions by practice and function do not belong in the bargaining unit. This position has been reaffirmed in our written correspondence dated May 28, 1993." In its letter, the Employer offered to discuss the Union's information request but claimed that the wage element was personal and confidential.

The record contains a letter dated September 2, 1993, from Union Business Agent Lowman to the Employer, regarding the March 29, 1993 grievance, requesting job descriptions for several employees, including two retail accounting clerks; two secretarial positions and a retail support specialist position in the merchandising department; a data entry clerk in the advertising department; a California Marketing Department Secretary (Jay Ross); a Store Development Order Matic Clerk; and a customer service secretary.

On September 30, 1993, the Employer responded that all of the retail accounting positions were located in its Tracy, California office and that there was no longer a payroll specialist position (that all such positions were now called retail accounting clerks); that the Employer had given the Union a copy of the job description for the position of secretary in the merchandising department; that the retail support specialist is an exempt position and not available; that the data entry clerk position in the advertising department was being re-evaluated and the duties were being reviewed; and that the California Marketing secretary, the order-matic clerk and the customer service secretary were confidential secretaries.

^{3/} The military marketing function was transferred to the West Sacramento facility in about February, 1993. The Employer agreed to place the two military clerks into the unit because

By letter to the Employer dated October 19, 1993, the Union withdrew its March 29, 1993 grievance. The letter reads in relevant part as follows:

Please be advised that the grievance filed by Teamsters Local 150 is being withdrawn by Local 150 without prejudice. Although it took a great deal of time to get the information needed to reach this conclusion, I appreciate your cooperation and hard work.

There is still one area of concern, the advertising department data entry clerk. Once you have reevaluated this position, please let me know of your decision. (I am sure this is a bargaining unit position.)

By letter dated November 16, 1993, the Employer took the position that the advertising department data entry clerk referred to in the Union's October 19, 1993, letter should be excluded from the unit as a confidential employee. The Employer enclosed a copy of the job description for this position and stated that "It is the [Employer's] position that the sensitivity and confidentiality of dealing with sales plans, RIM and APOLLO programs justifies our position that this is a confidential position."

The Union did not pursue its contention that the transferred positions should be included in the unit until 1997, during the negotiations for a new collective-bargaining agreement. On September 9, 1997, the Union filed a unit clarification petition in Case 20-UC-376. However, on September 26, 1997, the Union withdrew this petition, without prejudice, in the hopes of obtaining a resolution of the matter at the bargaining table. There appears to be no dispute that the Union notified the Employer at the time that unit certification petition was withdrawn that it intended to re-file another unit clarification petition if the matter was not resolved during negotiations over the new collective-

they had been represented by another Teamsters Union at its Milpitas facility.

bargaining agreement. However, the Employer did not stipulate or agree that any such a petition would be valid or timely.

During the ensuing negotiations, the Employer took the position that the unit should remain as it had existed in the past, comprised only of the accounting and data processing employees, with the addition of the two transferred military clerks. The Employer proposed an economic resolution of the unit issue that involved re-defining the unit so as to limit it to the existing classifications of employees in the unit and an agreement by the Employer to provide a bonus to the current unit employees if the Union agreed not to raise the unit issue again. This proposal was rejected by the Union.

By December 5, 1997, the parties had executed a new collective-bargaining agreement effective for the period July 1, 1997, through June 30, 2001. However, no agreement was reached as to the placement of the disputed classifications. The recognition clause contained in the current agreement reads:

All office-clerical employees. . . employed at the Employer's facility located at 3771 Channel Drive, West Sacramento, California and performing work within the jurisdiction of the Union pursuant to National Labor Relations Board Case No. 20-RC-9482, excluding guards, professional employees, confidential secretaries and supervisors as defined in the National Labor Relations Act.

On December 9, 1997, the Union filed the unit certification in the instant case.

The Susan Mair Grievances. In addition to the March 19, 1993, grievance described above, the Union also pursued other grievances filed by unit employee Susan Mair. Specifically, on July 16, 1993, the Union sent a grievance filed by employee Susan Mair to the Employer which alleged that work was being removed from her desk and

performed by non-union employees.^{4/} On August 31, 1993, the Employer responded that with respect to Mair's grievance, the Employer agreed to return the work referred to in her grievance (i.e., "spec" orders) to the bargaining unit. The letter states, "These duties which Susan was doing prior to the consolidation are currently being done by our merchandising clerks who had done this work while in Pleasanton. . . . Effective September 13, 1993 this work will be processed and keyed by our data entry clerks." However, Mair continued to complain to the Union that the work was never completely restored to her. The Union and the Employer discussed the issue but no resolution was reached.

The record includes a letter dated February 9, 1994, from Union Business Representative Lowman to the Employer claiming that the Mair grievance had not been resolved and listing the following types of work as continuing to be performed by non-bargaining unit employees: (1) spec orders; (2) credit request logs; (3) credit request adjustments; and (4) "4 ways" interdivisional pick ups. The letter requested a meeting on this matter. On March 9, 1994, the Employer, by letter to Lowman, responded to Mair's grievance with regard to particular types of work being performed.

In a letter dated March 21, 1995, Lowman again wrote to the Employer about ongoing problems with regard to resolving Mair's 1993 grievance. According to

^{4/} Such work included taking telephone calls from vendors, processing orders, all work related to specialty orders and processing OENTs.

Lowman's letter, Mair had complained that non-bargaining unit employees were doing bargaining unit work with regard to writing hand-tags on line order entry and spec orders. The letter requested a meeting to discuss the issue. On May 25, 1995, Mair filed another grievance about bargaining unit work being taken away from her. The accompanying letter to the Employer from the Union states that the loss of work being grieved pertains to work previously done by bargaining unit people in regard to the meat program and states that the Union claims the jurisdiction of this clerical work.

On July 8, 1997, the Union filed another grievance on Mair's behalf alleging that, "significant amounts of union work [were] being performed by non-unit employees (i.e., Alex Tayler, Cheryl Farrow, Linda Grinder, Jaoanni Webster, Pam Grappo, Rick Smith, Michele Busby, Steve Godfrey, Rob Morris, Bill McQuinn et al (including temporary employees). This has led to a loss of union jobs, a reduction of quality of service to customers and increased cost to the company."

The Employer's Other Collective-Bargaining Agreements. The Employer has a collective-bargaining agreement with the Union that covers a separate unit of approximately 100 drivers and loaders in its transportation department. It also has a contract with Warehouse Union Local 17, ILWU that covers approximately 200 warehouse employees (including foremen, order selectors, fork lift operators, repack/cigarettes employees and checkers) at its West Sacramento facility. The transportation and warehouse departments include several distribution clerks who are not at issue herein. Most of these employees work in the distribution center adjacent to the

office building where the unit clericals and employees sought to be included in the unit herein work.

The Employees In the Existing Unit. There are approximately 29 employees in the unit represented by the Union that are employed in the Employer's accounting department, information engineering department and military department. In the accounting department, there are about 22 unit employees in the following classifications: accounts receivable clerk, print/mail clerk, print room clerk, military clerk, central trade payable clerk, drop ship clerk, accounts payable clerk (Sacramento), accounts payable clerk (Fresno) ad clerk, accounting clerk, credit clerk, sales analysis clerk (Sacramento), sales analysis clerk (Fresno), floater, and customer service clerk. In the information engineering department, the unit employees include approximately 5 data entry operators. In the military department, it includes 2 military clerks.

The accounting department employees work on the second floor of the Employer's facility and are separated from other departments (i.e., the store development, Big T, military and meat departments) by a wall. They are overseen by Accounting Manager Creston Watson. The five data entry employees in the information technology department work on the first floor and are separated by a wall from the category marketing/procurement department employees. The data entry employees are supervised by Information Technology Coordinator Craig O'Noines and Information Technology Supervisor Adam Gromek. The two military clerks are under "corporate staff," and are supervised by Military Manager Bob Shields and two military supervisors.

The duties of the unit employees in the accounting department involve such work as processing bills and invoices; verifying the receipt of products; handling credit requests from retailers; processing the Employer's payroll; answering vendor inquiries and performing related computer research; printing retailer guides and bulletins; typing; answering telephones and distributing mail. The duties of the data entry employees in the information technology department involve data processing. The two military clerks in the accounting department handle military billings and cash transactions.

The wage rates of unit employees range from \$9.75 to \$13.99 an hour pursuant to the parties' collective-bargaining agreement. The unit employees also receive fringe benefits pursuant to the collective-bargaining agreement which differ from those received by the employees sought to be added to the unit herein.

The Category Marketing/Procurement Department Employees: Merchandising Clerk Nancy Bertolozzi. Nancy Bertolozzi is one of four merchandising clerks in the category merchandising side of the category marketing/procurement department. This department is on the first floor of the Employer's facility and is separated from the information technology department by a wall. Bertolozzi is supervised by Procurement Manager Dave Marcus and Category Marketing/Procurement Manager Steve Peterson.

Bertolozzi has worked for the Employer for approximately 15 years: from 1983 to 1989, as a receiving clerk in the grocery division at the warehouse at the West Sacramento facility; from 1989 until about 1993, as an inventory control clerk in the warehouse at West Sacramento; and from 1993 to the present as a purchasing secretary, a

position which in 1998 became known as a merchandising clerk. Bertolozzi has never been represented by a union.

About February 1, 1993, at the same time as the transfer of the Employer's merchandising department from its Milpitas to its West Sacramento location. Bertolozzi was transferred from her inventory control clerk position in the West Sacramento warehouse into the office building. As indicated above, the marketing department and the purchasing department were merged a few months prior to the hearing in this case and Bertolozzi's title changed from purchasing secretary to merchandising clerk. However, her duties remained similar to what they had previously been when her title was purchasing secretary.

Bertolozzi is responsible for inputting into the Employer's computer system pricing and promotional data that she receives from category advisors and purchasing specialists. She spends 90% of her time inputting items and prices for promotions and other data for special projects into the computer. As indicated above, Bertolozzi's job has remained basically the same since she transferred into the category marketing/procurement department. However, her responsibilities have increased. She is now responsible for the input of all grocery, frozen and dairy/deli item information into the computer. For the past two and one half years, Bertolozzi has also been responsible for coordinating all work assigned to her which means either completing it herself or assigning it to one of the other three merchandising clerks (i.e., Charmen Cardenas, Cheryl Farrow and Alex Silva) in her department. According to Bertolozzi, she assigns work to the other clerks about once a week based on her assessment of workloads

(including her own) and the skills of co-workers. Most of her delegation of work to other clerks consists of special projects which Bertolozzi has been directed to delegate to others if she is unable to complete them herself. Other than Bertolozzi, only category advisors and purchasing specialists give assignments to merchandising clerks.

Bertolozzi is responsible for overseeing the work of Cardenas and Silva on a daily basis and ensuring that they complete their work. Category Marketing/Procurement Manager Steve Peterson directed Bertolozzi to train new employee Charmen Cardenas and to review her work. Bertolozzi reviews Cardenas' work on a daily basis but she does not review Silva's work. Once Cardenas is trained, Bertolozzi will no longer be reviewing her work.

Bertolozzi does not provide input for the evaluations of the other merchandising clerks nor does she discipline or recommend disciplining for them. Rather, the record shows that Procurement Manager Dave Marcus and Category Marketing/Procurement Manager Steve Peterson inform Bertolozzi if one of the other clerks has made an error. Bertolozzi is responsible for determining why the error was made. On such occasions, she goes over the item with the clerk involved and reports back to Marcus or Peterson regarding what occurred. This has happened twice with Charmen Cardenas. On both occasions, Bertolozzi spoke with Cardenas about what she did wrong and explained to her how to correct the problem. According to Bertolozzi, there was no discipline involved on either of these occasions. Peterson and Marcus sometimes deal with the other clerks directly on such matters if Bertolozzi is not available.

Bertolozzi is hourly paid at a rate of \$14.55 an hour. She decides if and when she must work overtime to complete a project. She usually eats lunch with the other merchandising clerks in the category advisor's office. Most of Bertolozzi's interactions are with other employees in her department but she does have some contact with accounting employees and data processing employees who are in the bargaining unit.

Merchandising Clerk Charmen Cardenas. Charmen Cardenas was hired three months before the hearing in this case. She testified that her title is purchasing secretary. On the Employer's organizational chart, her title is shown as merchandising clerk. Cardenas works in the category marketing/procurement department and is supervised by Steve Peterson. Her work station is located near the other employees' work stations in the merchandising department on the first floor of the Employer's facility. Her work cubicle is next to that of Merchandising Clerk Nancy Bertolozzi.

Cardenas' primary responsibility is to input various types of data into the Employer's computer system. She spends about 40% of her time on the phone with brokers obtaining information such as when future promotions will occur and setting up appointments. The information that she inputs into the computer includes free-form notes on sales items used by the purchasing specialists; price changes given to her by the category advisors; "MEQs," which involve inputting notes given to her by purchasing specialists on military deals; and inputting "deals" obtained from category advisors. Cardenas testified that Nancy Bertolozzi also inputs similar deals involving special notes or other items that she (Cardenas) does not know how to handle. Cardenas also checks

the “confirmation log”^{5/} to ensure that orders have actually been placed. In addition, she contacts carriers to schedule delivery appointments on purchase orders and distributes papers from Dave Marcus’ outbox.^{6/} Cardenas also sometimes proof-reads advertisements for Merchandising Clerk Alex Silva. Cardenas does not answer the telephones for other personnel and does not do word processing for anyone. Nor does she do “handtags.” She empties the fax machine for the purchasing specialists; distributes materials to them; and does their inbound reports;^{7/} or “next deals”, on an as needed basis. Occasionally, she has substituted for a purchasing specialist who was absent for part of a day.

Cardenas is an hourly employee paid at a rate of \$10 an hour. She works from 7 a.m. to 3:30 p.m., Monday through Friday. She uses the break room for lunch but eats lunch with other merchandising clerks (Bertolozzi, Farrow, Vela and Silva) in a category advisor’s office. She has no regular contact with employees outside the category marketing/procurement department. Cardenas testified that Nancy Bertolozzi trained her and assigns work to her on a daily basis that Bertolozzi gets from the category advisors. According to Cardenas, Bertolozzi crosses out her own name and writes in Cardenas’ name on such work and Cardenas finds it in her box.

^{5/} Cardenas testified that the confirmation log is a record of purchase orders that are automatically faxed directly to brokers.

^{6/} Cardenas testified that she does no other secretarial work for Marcus and that he is not her supervisor.

^{7/} Doing inbound reports means calling brokers because purchase orders do not have appointments.

Merchandising Clerk Cheryl Farrow. Cheryl Farrow has worked for the Employer for about 10 years at the West Sacramento facility. She began as a “floater” in the accounting department. In March, 1990, she transferred to the position of receiving/distribution clerk, a non-bargaining unit position. In June 1992, Farrow became a human resources clerk. In November 1994, she transferred to the merchandising department and became a purchasing secretary. Her title subsequently changed to merchandising clerk and she took on additional responsibilities but it appears that her job has remained essentially the same since 1994.

Farrow’s primary duty is to input data into the computer concerning chain listings; to deal with retailers on the telephone, including researching questions for them and handling other problems; and to be the primary contact person for one customer, Richland Markets. She handles problem calls from retailers concerning pricing, wrong UPC (Uniform Product Code) codes, and the Vision Net Retailer System, etc. She handles between 50 and 100 calls a week from retailers.

Farrow also spends some of her work time inputting price reductions and performing related tasks in connection with the computerized price reduction system. This task was performed by a category advisor prior to December 1994, when it was given to Farrow. Some of this work is also performed by Doris Bertram, a marketing secretary who is also in the category marketing/procurement department. In addition to the foregoing tasks, Farrow keys in specialty orders and “OENTs” for Richland Foods.

Farrow has some contact with bargaining unit employees. Once a week, she drops off a report to Advertising Clerk Jeff Borgie, an accounting department employee.

Occasionally, she also speaks by phone to Customer Service Clerk Susan Mair, who is also an accounting department employee. Farrow also interacts with data processing employees. She usually has lunch with other employees in the category marketing/procurement department, usually in a category advisor's office.

Farrow is an hourly employee and earns \$12.95 an hour. She works from 7 a.m. to 3:30 p.m.

Merchandising Clerk Alex Silva. At the time of the hearing, Alex Silva had been employed by the Employer for about 19 months as a merchandising clerk in the category marketing/procurement department. According to Silva, her job has not changed significantly since she started working for the Employer. Silva spends about 75 or 80% of her time “comstocking”^{8/} ads for Big T Value King and IGA; proofing Big T Value King and IGA sales presentations^{9/} doing export orders and specialty orders; and doing special projects given to her by category advisors or her manager. She also handles distributions for Super K-Mart Stores which takes up about 25 to 30% of her work time.^{10/} According to Silva, special projects have included such matters as changing the cost of a specific item in the computer.

^{8/} Silva testified that to comstock ads means that she obtains a quantity for an item from the purchasing specialists and inputs it into the computer so that they can buy the product for the specific ad for that week.

^{9/} Silva testified that sales presentations are forms that category advisors receive from vendors or brokers. To proof them, she uses the computer to make sure that the item code, UPC, price, and description are correct on the form.

^{10/} Silva testified that this involves handling calls from the Super K Mart district office and handling problems relating to their ads or orders.

Silva's interactions with other employees are primarily with the category advisors, purchasing specialists Nancy Bertolozzi, Cheryl Farrow, Barbara Vila and Charmen Cardenas and Procurement Manager Dave Marcus. She has no regular contact with any other employees outside her department.

Silva is an hourly employee, earning \$10.05 per hour. She works from 7:30 a.m. to 4 p.m., Monday through Friday. She eats lunch with other employees in her department in a category advisor's office. When Silva is ill, Nancy Bertolozzi covers her desk and Silva covers for Bertolozzi when Bertolozzi is absent. Silva regularly interacts only with the employees in the category marketing/procurement department.

Merchandising Secretary Barbara Vela. Barbara Vela has been employed as a merchandising secretary/department secretary in the category marketing/procurement department for 5 years. She reports to Category Marketing/Procurement Manager Steve Peterson and acts as his secretary. For the few months prior to the hearing in this case, Vela also served as secretary for Store Development Manager Gary Whittaker.

Vela performs the secretarial work for the category marketing department. She answers the telephone for Peterson and Whittaker; schedules their appointments and presentations; and prepares reports and statements at the end of reporting periods. She also keeps track of vacation schedules and accrued sick time for employees in the department. Vela's tasks include typing performance evaluations; typing other personnel documents such as merit increase forms and incentive compensation forms; occasionally typing directives from Peterson to employees in the department; filing materials in

personnel files maintained in the department; and writing up billing for coupon books.

Vela also answers the telephone for all the category advisors.

Vela testified that three or four of her functions are also performed by category advisors, particularly when she is absent. These tasks include proofing their sales ads and sales presentations; doing specialty orders; and handling the billing for the coupon book. She further testified that purchasing specialists also perform some of the functions that she performs such as doing comstocking for ads. In addition, she performs work that the purchasing specialists perform when they are overloaded and need help. For example, she inputs deals and price changes, which are also handled by Merchandising Clerks Nancy Bertolozzi and Charmen Cardenas; she does "ASAPs" which are generally done by Merchandising Clerk Cheryl Farrow; and she "sets up" new items which is generally done by Bertolozzi. According to Vela, Bertolozzi has occasionally assigned work to her when Bertolozzi or Farrow were overloaded or if they had a special project to do. Vela testified that prior to June 1997, she used to bring specialty orders to data processing to have them inputted into the computer but now she does them herself.

Vela has limited contact with bargaining unit employees. She drops off the merchandising bulletin or other print jobs to Print Shop/Mail Clerk Jeff Payne, an accounting department bargaining unit employee, for copying two or three times a week.

Vela is hourly paid at a rate of \$13.50 an hour. She eats lunch with other employees in her department in the category advisor's office.

Senior Category Marketing Secretary Doris Bertram. From 1961 to 1986, Doris Bertram was employed in Richmond, California. Prior to 1984, she was a personal

secretary for the Western Regional Directors of Fleming and its predecessor, United Grocers. During that period, Bertram was covered by a Teamster collective-bargaining agreement. In 1984, the Employer purchased United Grocers and Bertram became the secretary to the president of the Employer's division. From 1984 forward, she was no longer covered by a Teamster collective-bargaining agreement. Bertram transferred to the Employer's Pleasanton facility in 1986.^{11/} In 1989, Bertram no longer acted as a personal secretary but instead began handling the Employer's co-op advertising program which involved handling advertising contracts between the Employer and vendors and retailers. In 1992, she was transferred to the Employer's Milpitas office when the Pleasanton facility closed down. In February 1993, she was transferred to the West Sacramento location. About 2 years prior to the hearing in this case, Bertram was transferred from the advertising department to the category marketing/procurement department.

Bertram testified that her duties did not change as a result of her transfer to the West Sacramento office or her subsequent transfer to a new department and that the only thing that changed was her boss. According to Bertram, she continued to handle advertising contracts and also had new duties added to her position, such as handling custom price zones for Food 4 Less stores and inputting price reductions into the computer.

^{11/} Bertram testified that when she worked at the Pleasanton facility, she was no longer covered by a Teamsters collective-bargaining agreement. She testified that the Pleasanton facility housed the Employer's western region management and merchandising department. Some merchandising department employees at Pleasanton transferred to Milpitas when Bertram transferred and others were laid off. When Bertram later transferred to the West Sacramento office, most of the merchandising employees transferred there too.

Bertram is supervised by Category Marketing/Procurement Manager Steve Peterson. She works on the first floor in the merchandising section.^{12/} About half of Bertram's work time is spent working on a computer. Bertram's duties in administering the co-op advertising program involve monitoring advertising agreements entered into between retailers and vendors.^{13/} She receives the final written contract and is responsible for inputting the information into the Employer's computer to ensure that monies promised under the contract are paid. If a vendor notifies Bertram that a retailer did not perform, Bertram is responsible for debiting the retailers account on the Employer's system. Likewise, if a vendor does not pay the retailer as required under the contract, Bertram calls the vendor to take care of the situation. In administering these contracts, Bertram spends a few hours on the telephone with vendors and retailers each week solving problems for them and checking information for them on the computer system. She testified that she receives about half a dozen phone calls from vendors and retailers each week. Bertram does not physically go to the stores to see if advertisements are correct or to monitor compliance with contracts.

Another function added to Bertram's job in 1993 or 1994, after she transferred to the West Sacramento facility, was to update customer price zones for the Food 4 Less contract and to check the information for consistency with their advertising contracts. In

^{12/} Previously, Bertram was supervised by Advertising Manager Rich Weitkemper. She testified that the only thing that changed after she was transferred to category marketing was that she no longer had to take Weitkemper's phone calls anymore and that now she handles no one's calls except her own.

^{13/} Such contracts generally provide that a retailer will engage in certain advertising or promotional activities with respect to a particular vendor's product.

connection with this function, Bertram prepares a weekly bulletin on her computer which she sends to these stores, explaining what advertising they must do in order to be paid under the contracts. She also updates these customer price zones on a weekly basis. Bertram also handled an ESP (Extra Savings Program) from the time she transferred to West Sacramento until the time of the hearing. However, this program was being eliminated at the end of January 1998.^{14/} About 2 years before the hearing in this case, Bertram was made responsible for inputting certain price reductions into the Employer's computer system. At about the same time, duties such as handling food shows and special events were removed from Bertram's responsibility. Bertram does not answer the telephone, type correspondence or do filing work for anyone else.

Bertram is hourly paid at a rate of \$16.45 per hour. She works from 7:30 a.m. to 4 p.m., Monday through Friday. She does not take lunch breaks, does not punch out for lunch and never uses the break room. Her primary interaction is with "merchandising managers" and "category managers" in the category marketing/procurement department. She also has contact with the Employer's manager of information technology, Craig O'Noines, especially if she has computer problems. Bertram's only interaction with bargaining unit employees is with regard to the delivery of certain reports and a check register to Ad Clerk Jeff Borgie in the accounting department once a month and

^{14/} Bertram testified that the ESP program involved producing a list of items supplied by category advisors; sending it to the retailers signed up on the program so they can put the items into their computers; reimbursing retailers at the end of each month the amount offered under the program by the vendor; and providing a list of the items to the advertising manager so that the Employer's Oklahoma City office can print flyers, hand-bills and other materials given to the stores.

occasional follow-up with Borgie if there is a problem.^{15/} Bertram testified that she does not substitute for any other employee and no other employee substitutes for her.

Control Label Secretary Jua Xiong. Jua Xiong was hired by the Employer in January 1997 as a purchasing secretary. In October 1997, she became a control label secretary in the category marketing/procurement department. Xiong is supervised by Category Marketing/Procurement Manager Peterson but is assigned to an outside division called the Damon Control Group that has offices within the Employer's facility and her work is directed by Damon employee Jim Miller.

In Xiong's first job as purchasing secretary, her principal duties involved data processing. Most of her mornings were spent checking on inbound trucks to determine if they were on schedule and checking for price discrepancies. The rest of her day was spent on data processing, handling telephone calls and calling orders into vendors. According to Xiong, the Employer consolidated the purchasing and merchandising departments in 1997, and eliminated two purchasing secretary positions. She testified that Charmen Cardenas is the only employee left doing her job but that the data processing and data entry work of the former purchasing secretaries (e.g., data inputting of new items and price changes) is now being done by Alex Silva and Nancy Bertolozzi.

^{15/} According to Bertram, Borgie is responsible for handling advertising payments to retailers and the billings to vendors. She supplies him with reports, check registers and a copy of the report to Controller Cres Watson. She testified that she had to follow up with Borgie only about once in the past year. She testified that she has no regular interaction with anyone else in the accounting department.

Xiong's principal duties at the time of the hearing were processing orders from retailers on a computer. About 70% of her work time is spent inputting such orders into the Employer's computer system and checking them for problems; printing them; and faxing them to vendors. In addition, Xiong assists Damon employees in various ways such as taking telephone calls for them; routing documents; and telephoning vendors to check on discrepancies in pricing, etc. Xiong has created a variety of charts, graphs and spreadsheets to keep track of data on her computer. Xiong is also responsible for creating "handtags" which she sends via intra office delivery to the Employer's accounting department. One morning a month, Xiong creates "back bills" from the handtags created during the preceding month in order to ensure proper billing. Other Damon employees also create handtags similar to those prepared by Xiong.

The record reflects that on one occasion, accounting department/bargaining unit employee Irene Geringer, asked Xiong questions about a hand tag she had done. Xiong also had contact with the employees in the accounting department with regard to "direct drop shipments," i.e., goods that are shipped directly from the vendor to the retailer but are billed through the Employer's system. In order to do a direct drop shipment, Xiong must obtain the permission of accounting department employee Iysha Myers, who is in the bargaining unit. Xiong also takes drops off information to the accounting department so that accounting employees such as Geringer can do "bill-backs," which involve discount allowances given to the Employer.

Xiong is hourly paid at a rate of \$10.60 an hour. She works from 7:30 a.m. to 4 p.m., Monday through Friday. She eats in the lunchroom but does not socialize with bargaining unit employees. She does not substitute for any other employee.^{16/}

Employees in the Voluntary Groups Department. Senior Department Secretary Jay Ross. Since January 1992, Jay Ross has been a senior department secretary (Big T/VK Secretary) in the Voluntary Groups Department. His supervisor is Mike Tolley, the Director of the Voluntary Marketing Department. During this period, Ross' job duties have remained essentially unchanged since 1992. He spends about 40 to 60% of his time on the telephone communicating with one of three retailers serviced by the voluntary groups department. He handles about 5 to 10 calls a day. Ross verifies the accuracy of advertised sales prices with retailers or vendors; and responds to retailer inquiries regarding why deliveries have not been received. In the later case, he calls the warehouse to find out what happened. Ross also works on the "hot line," used by vendors to communicate such information as errors in a printed advertisement. Most of the time Ross handles questions without seeking the help of other employees. He answers and routes E-Mail. Ross also organizes the Employer's golf tournament. He selects the golf course to be used; negotiates green fees; selects hotels; negotiates with hotels regarding room rates for the Employer's employees and their guests; and negotiates with caterers concerning banquet prices. He also coordinates with the service that provides exposition facilities for food shows concerning such matters as electricity at the facility, fire marshal visits, etc. These activities take up about 20 to 30% of his work

^{16/} When she was a purchasing secretary and during the consolidation of departments, she filled in for the other purchasing secretaries and for Nancy Bertolozzi.

time for about 3 months out of the year. Ross is also responsible for the production, proofing and distribution of the Employer's weekly sales plan. He determines what items in the sales plan will be advertised on shelf signs produced for retailers to place on store shelves and what other types of advertising will be used for retailers.

Approximately twice a year for one or two days, Ross goes to the facility of new customers (retail stores) and assists them in the conversion of their shelf tags from the competitor's tags to those provided by the Employer. Ross spends about 10% of his time inputting data into the computer. He also spends about 30 to 50% of his time on the computer in connection with problem solving for retailers and vendors or creating or formatting his own spreadsheets to keep track of data he needs for his job. One of the tasks that requires such spreadsheets is the calculation of the payout to a retailer on a promotion or contest. On occasion, he types letters or memos for other employees. As the department secretary, Ross is also required to type employee evaluations and disciplinary notices.

When Ross is absent or on vacation, no one substitutes for him. Calls from vendors that would normally be referred to Ross are referred instead to the marketing coordinator or the advertising specialist in the voluntary groups department in his absence.

Ross is scheduled to work from 7 a.m. to 4 p.m., Monday through Friday. He determines when he will take his lunch and breaks during the day. He also decides when he needs to work overtime and does not need his supervisor's approval before doing so.

Ross is hourly paid and earns \$12.95 an hour. Ross has frequent contact with accounting department unit employees, Sales Analysis Clerk Irene Geringer and Accounts Payable Clerk Diane Leach on a daily basis. His cubicle is located across from the military department work stations. He does not use the break-room at the facility.

Advertising Clerk Trish Flanagin. Trish Flanagin has been an advertising clerk in the Employer's voluntary groups department since 1996.^{17/} She is supervised by the Director of Voluntary/IGA Marketing, Mike Tolley. Flanagin spends 90% of her time inputting the weekly sales plan and ads generated from that sales plan into the computer. In doing so, Flanagin uses an Employer computer system called Access. Flanagin is the only employee at the West Sacramento facility who is able to use this system which is located on the Employer's mainframe computer in Oklahoma. The category advisors in the category marketing department provide Flanagin with advertisements and she inputs information from the ads in to the computer. Ad specialists then review the plan and make format changes and include pricing information, which Flanagin also inputs into the computer.

Flanagin spends 10% of her time creating a spread sheet for accounting department/bargaining unit employee, Ad Clerk Jeff Borgie, that is used by Borgie to bill vendors.

^{17/} Flanagin was hired by United Grocers as a receptionist in March 1982. She began working with Fleming when it acquired that company. Flanagin worked in various positions prior to July 1996, including as a merchandising clerk for specialty foods when that department transferred from Pleasanton. None of the positions that she has held have been in the unit.

Flanagin is an hourly paid employee who earns \$12.35 an hour. She has contact primarily with employees in the voluntary groups department and with the category advisors in the category marketing department. However, she also has regular contact with unit employees Borgie and Customer Service Clerk Susan Mair. Flanagin uses the lunch room and eats lunch with members of the bargaining unit.

Bakery/Deli Sales Coordinator Pam Grappo. Pam Grappo was hired by the Employer as the bakery/deli sales coordinator in May 1997. She is supervised by Linda Grinder, the bakery/deli operations supervisor. Grinder and Grappo are the only two individuals in this department. Grappo's cubicle is located on the first floor of the Employer's facility near the warehouse. Approximately three days a week, when Supervisor Grinder is out of the office making sales calls, Grappo is left in charge at the office.

Grappo's principal duties involve telemarketing. She spends approximately 25 hours a week on the telephone taking orders and attempting to sell products to retail bakery and deli managers and to obtain new business for the Employer. To do this, she uses a pre-established list that is in her computer. Grinder and Grappo jointly decide which bakery and deli items to market each day and they decide on the range of possible price breaks for customers. Grappo can offer additional price reductions to customers in order to match a competitor's price. She also has the authority to issue a credit to a retailer if they have received damaged products. If products are spoiled or outdated,

however, Grappo must obtain Grinder's approval before giving the customer a credit allowance for such products.

Grappo spends about an hour a week doing "add on" orders for retail bakery and deli customers and is authorized to prepare hand-tags to get orders filled. While Grappo also occasionally creates purchase orders, they are most often done by Grinder.

Grappo spends a minimal amount of time preparing and mailing flyers advertising various bakery/deli specials that the Employer is offering to customers. In addition, she makes changes to the weekly "bakery/deli guide," which describes the Employer's prices and products. To do this, she handwrites the changes on the prior guide and sends it to an outside service for the modifications to be made.

Both Grinder and Grappo work on the Employer's semi-annual food shows. Their duties in this regard include contacting vendors prior to the show to see if they will be offering price breaks on their products; ensuring that products to be sold at the show are in stock; making arrangements for vendors to participate in the show; attending the show; and soliciting orders from others attending it.

Grappo drops off paperwork to various employees in the accounting department, including giving hand-tags to Irene Geringer; "truck shorts" to Susan Mair; and credit allowances to Linda Solomon. She also deals with Karla Maze in the retail pricing department in order to get items "unrestricted," and with employees in the transportation department and in the warehouse. She also deals with Bertolozzi when she needs to get numbers assigned to new items she is setting up. Grappo testified that Mechele Busby

does similar work for the meat department. According to Grappo, she and Linda Grinder cover for each other during absences and she does not substitute for any other employees.

Grappo is hourly paid at a rate of \$14.50 an hour. She works from 7 a.m. to 3:30 p.m. She normally eats at her desk and does not use the break-room.

Retail Pricing Coordinator Karla Maze. Karla Maze has worked as the retail pricing coordinator since December 1996. She is supervised by Retail Pricing Manager Danny Tafoya and works in the retail pricing department. Maze and Tafoya are the only persons in this department. About 90% of the time, Tafoya is in the field visiting retailers so Maze is the only person in the department. Maze does not do any typing or filing for Tafoya.

On a weekly basis, Maze spends about 80 to 90% of her time producing about 60 regular pricing reports and about 10 to 15 specially requested reports to retailers. This work involves gathering computer data requested by retailers and printing it out for them. It does not involve inputting any data into the computer, but rather manipulating the software and data in the Employer's computer system and producing reports with information needed by retailers.

Maze also sets prices, within broad pricing guidelines, on new general merchandise and health and beauty items that the Employer sells. Each week Maze receives a voluminous report that contains a listing of all the general merchandise items sold by the Employer, including about 300 new items per week. Maze has discretion, within a set percentage range, to determine the initial price that the Employer will charge for new items. She makes similar decisions for new health and beauty items. She makes

handwritten notes on the computer reports and these are given to data processing for inputting into the computer.

Maze is also authorized to set temporary price reductions on certain grocery items. In this regard, she is given a report containing 200 to 300 items each week, categorized by pricing zones. From this list, Maze selects about 100 to 185 items for a temporary price reduction. Such reductions are required to be in force for a four (4) week period. Maze determines, within a percentage range, the amount of the reduction. Once she makes her selections and determines the amount of the reduction, she inputs the information into the computer.

Maze is an hourly employee paid at a rate of \$10.05 per hour. She testified that she interacts with other employees because she gets reports that are printed through data processing by print operators and information technology employees and she must direct questions to them. She also interacts with accounting employee Irene Geringer when Maze does repetitive four-way billing and creates label counting reports that she drops off with Geringer.

Retail Services Coordinator Shelli Porterfield. Shelli Porterfield works in the retail services department and is supervised by Retail Technical Services Manager Quentin Dees. The Employer leases and/or sells computer equipment and other hardware such as scanners, printers, software and a hand-held device called a Telxon that allows retailers to input price changes from products on the shelf. Porterfield's duties are to provide training and technical support to retailers in the operation of such equipment; to prepare and maintain leases on the equipment and software; to maintain an inventory of

Telxons and other equipment; to sell supplies to retailers such as paper stock, labels, toner, drums, etc.; and to sell new products to customers. Porterfield spends about 80 percent of her time on the telephone with retailers in connection with these tasks.

Porterfield spends about 15% of her time boxing orders and preparing them for shipment. She also initiates the billing on equipment leases. However, after the billing is initiated, routine billing is handled by the accounting department. Porterfield monitors the billing and reconciles bills generated by the West Sacramento office with the records from the Employer's corporate offices in Oklahoma City.

Porterfield also monitors the operation of the Employer's computer system. Price changes inputted by retailers go directly to the Employer's mainframe computer in Oklahoma City. The retailers then fax a confirmation sheet to Porterfield showing that they have input their changes. Porterfield verifies that the information on the faxes was actually input into the mainframe. If there is a problem, Porterfield corrects it. She also sends billing information for her department to the accounting department, which does the billing, and she prepares a monthly billing reconciliation for Oklahoma City.

Porterfield sometimes types equipment leases or letters for Dees. Occasionally, Porterfield goes out to retailers when a new pricing system is installed in order to ensure that the items in the store are priced correctly in the Employer's system.

Porterfield is an hourly employee paid at the rate of \$12.64 an hour. She works 8:30 a.m. to 5 p.m., Monday through Friday. She has contact with the managers in the information technology department in attempting to solve computer problems. Porterfield testified that she does not have regular contact with any other employees

outside her department. She testified that no one covers for her position when she is sick and that once, when she was on vacation for 2 weeks, a temporary filled in for her after she spent 2 weeks training the temporary to do her job. The temporary was able to do all of her job except for the reconciliation described above which Porterfield described as being very complicated. At the time of the hearing, Porterfield was training a temporary to take over for her while she was out on maternity leave.

Meat Department Secretary/Administrative Assistant Mechele Busby. At the time of the hearing, Mechele Busby had worked for the Employer for approximately five and one half years. For the year prior to the hearing, she worked as an administrative assistant or “department secretary” in the meat department. Previously, Busby worked as an accounting clerk in the accounting department and was in the bargaining unit.

Busby spends about 40 to 50% of her time on the telephone with retailers doing telemarketing. Part of her telemarketing job is order-taking and part is sales. The meat buyers in the department, Bill McGuinn and Rob Morris, also perform this function which involves not only speaking to retailers on the phone but inputting the orders received into the computer system and responding to retailer inquiries. According to Busby, McGuinn, Morris and she divide up the customers and make the calls to meet a 10 a.m. deadline. Busby and other meat department employees also do about 10 to 20 hand-tags a day. Hand tags are orders that are entered into the system after the cut-off time for regular ordering.

Busby also updates price lists for the meat department and puts together the department’s “meat book” for mailing to retailers. In addition, she prepares and

maintains sales reports for the department; provides the department with reports on costs and inventory; and maintains a rebate program and writes checks to retailers for rebates. Twice a year she also travels to food shows, setting up displays and taking orders for the meat department. Other meat department employees perform similar work. After the food shows, she inputs meat orders into the Employer's computer system.

Busby spends about 10 to 20% of her time on secretarial duties, including the preparation of correspondence, for John Clemens, the head of the meat department. She also answers the phones for all meat department employees and assists the buyers in deciding what meat products the Employer will purchase.

Busby is hourly paid at a rate of \$13.25 an hour. She has little regular contact with any employees outside the meat department. Such contacts are limited to dropping off the updated meat book to the print shop where she sees bargaining unit employee Jeff Payne. She also provides information to accounting department employees regarding rebates used by them to issue rebate checks and she takes hand-tags and credit memos to accounting after she prepares them. Bargaining unit employee Linda Solomon taught Busby how to prepare credit memos and she learned how to do hand-tags when she was employed in the accounting department. Meat buyers cover Busby's desk when she is on vacation. She substituted for Meat Buyer Rob Morris when he was absent for 3 days and during this period was given authority to order products from the Employer's vendors.

Analysis: The Board's express authority under Section 9(c)(1) to issue certifications carries with it the implied authority to police such certifications and to clarify them as a means of effectuating the purposes and policies of the Act. Thus, under

Section 102.60(b) of the Board's Rules and Regulations, Series 8, a party may file a petition for clarification of a bargaining unit where there is a certified or currently recognized bargaining representative and no question concerning representation exists.

The Board described the purpose of unit clarification proceedings in Union Electric Co., 217 NLRB 666, 667 (1975):

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, are within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category--excluded or included--that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if an agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

A unit may be clarified during the term of a collective bargaining agreement for limited purposes,^{18/} including where the positions are newly created after an agreement is reached or where the parties are unable to reach an agreement as to the disputed

^{18/} Other reasons for allowing a unit clarification mid-term during a contract include where employees are performing a new operation; where the contract expressly excludes a group, such as supervisors, and there is a dispute as to the supervisory status of certain classifications in this regard; and in order to resolve the unit placement of classifications of employees who were allowed to cast challenged ballots during an election in which their votes were non-determinative, and the parties are unable thereafter to resolve the dispute. See Kirkhill Rubber Co., 306 NLRB 559 (1992); Crown Cork & Seal Co., Inc., 203 NLRB 171 (1973); Western Colorado Power Co., Inc., 190 NLRB 564 (1971); Alaska Steamship Co., 172 NLRB 1200 fn. 8 (1968);

classifications during bargaining and the UC petitioner does not abandon its position in exchange for contract concessions. See Union Electric Co., *supra*; Bethlehem Steel Corporation, 329 NLRB No. 33 (September 27, 1999); Brookdale Hospital Medical Center, 313 NLRB 592 fn. 3 (1993); Baltimore Sun Co., 296 NLRB 1023 (1989); St. Francis Hospital, 282 NLRB 950 (1987), and cases cited therein; WNYS-TV (WIXT), 239 NLRB 170 (1978); Massey-Ferguson, Inc., 202 NLRB 193 (1973).^{19/}

On the other hand, the Board refuses to clarify a unit in the middle of a contract term when the object is to change the composition of a contractually-agreed upon unit by the exclusion or inclusion of employees. The Board's rationale for this policy is that to grant a clarification petition at such a time would be disruptive of a bargaining relationship voluntarily entered into by the parties when they executed the existing contract. Edison Sault Electric Company, 313 NLRB 753 (1994); San Jose Mercury & San Jose News, 200 NLRB 105, 106 (1972); Monongahela Power Co., 198 NLRB 1183 (1972).

In the instant case, the historical unit has been described as "all clerical employees," and the thirteen positions herein at issue are neither expressly included or excluded from this unit. It is undisputed that most of these thirteen positions were added to the Employer's West Sacramento facility in about February 1993. The record shows that prior to that time, the Union had only been apprised by the Employer that employees in certain classifications were being relocated to the West Sacramento facility as the

^{19/} Where, however, the parties were aware that a disputed classification was encompassed by the unit but did not protest until immediately after the execution of a collective-bargaining agreement, the Board has found the petition untimely. See Arthur C. Logan Memorial Hospital, 231 NLRB 778 (1977).

result of the close-down of other Employer facilities. The most recent collective-bargaining agreement between the parties had been ratified in July 1992, and was executed by the parties in November 1992. All but two of the positions (i.e., those of administrative assistant in the meat department and the bakery/deli coordinator) have been in existence at the Employer's West Sacramento facility since the transfer of employees from Pleasanton and Milpitas to West Sacramento in approximately February, 1993.

Given that the ratification and execution of the 1992-1997 collective-bargaining agreement by the parties pre-dated the transfer of the employees in these disputed classifications, I find that the Union's failure to file a unit clarification petition prior to or during the term of the 1992-1997 agreement did not render the current petition untimely.

The unit placement of the positions at issue were clearly disputed between the parties during the term of the 1992-97 agreement, as demonstrated by the Union's filing of grievances over the issue during this period and its request that the Employer bargain over the terms and conditions of employment for such employees. Although in 1993, the Union withdrew a grievance concerning such classifications, there is no evidence that the parties ever reached any agreement as to the inclusion or exclusion of these employees from the unit. It is well settled that accretion disputes are solely within the Board's province to decide. *Combustion Engineering, Inc.*, 195 NLRB 909, 911 (1972). Accordingly, in the absence of an agreement between the parties resolving the unit

placement of these individuals, the Union's decision to discontinue processing a grievance over the matter did not constitute a waiver of its right to pursue this issue through a unit clarification proceeding. See *Progressive Service Die Co.*, 323 NLRB 183 (1997); *Bethlehem Steel Corporation*, 329 NLRB No. 31 (September 27, 1999); *Bethlehem Steel Corporation*, *supra*, 329 NLRB No. 33.

On September 9, 1997, after the expiration of the 1992-1997 agreement, the Union filed Case 20-UC-376, in order to resolve the issue of the unit placement of the disputed classifications. However, the Union thereafter withdrew that unit clarification petition without prejudice in order to try to resolve the matter in negotiations with the Employer. The Union notified the Employer that it would re-file its petition if the matter was not resolved. Thus, while the Employer never waived its right to object to the timeliness of any new petition filed by the Union thereafter, it was put on notice by the Union of the Union's intent to re-file the UC petition unless agreement was reached on the issue. In this manner, the Union preserved its right to re-file the instant unit clarification petition.²⁰ It is undisputed that the parties were thereafter unable to resolve the issue of whether the disputed positions were properly included in the unit. No agreement was reached on the issue and negotiations concluded in November, 1997, when the parties agreed to a new collective-bargaining agreement, which is effective by its terms from July 1, 1997, through June 30, 2001. Thereafter, on December 9, 1997, the Union re-filed the unit clarification petition seeking to resolve the unit placement of the employees herein.

Based on the application of relevant case law to the facts of this case, I find that the existing unit does not on its face include or exclude the disputed classifications and there has never been any agreement between the parties as their unit placement. Their status is still plainly in dispute. I conclude that the Union did not waive its right to pursue the instant petition and that it preserved its right to file the instant petition by its notice to the Employer of its intent to re-file such a petition if the matter was not resolved during the negotiations over the most recent collective bargaining agreement.

Accordingly, I find that the petition is timely filed and I decline to dismiss it.

Whether An Accretion Is Proper. In determining whether an accretion exists, the Board in *United Parcel Service*, 303 NLRB 326, 327 (1991), observed:

In furtherance of the statutory duty to protect employees' right to select their bargaining representative, the Board follows a restrictive policy in finding accretion. See, e.g. *Towne Ford Sales*, 270 NLRB 311 (1984). One aspect of this restrictive policy has been to permit accretion only in certain situations where new groups of employees have come into existence after a union's recognition or certification or during the term of a collective-bargaining agreement. If the new employees have such common interests with members of an existing bargaining unit the new employees would, if present earlier, have been included in the unit or covered by the current contract, then the Board will permit accretion in furtherance of the statutory objective of promoting labor relations stability. *Gould, Inc.*, 263 NLRB 4432, 445 (1982).

The Board's policy is to exclude office clerical employees from a production and maintenance unit and to find that a separate unit of office clerical employees is appropriate. See *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129 (1971). The employees herein at issue all perform some clerical tasks. The issue is whether each

^{20/} To reach any other conclusion under the circumstances presented herein would contravene the Board's policy of giving parties full opportunity to resolve their disputes privately without Board

would be considered an office clerical, plant clerical or some other type of employee. The difference between an office and a plant clerical is rooted in community of interest concepts. See Mitchellace, Inc., 314 NLRB 536 (1994).^{21/} A clerical whose principal functions relate to general office operations that are performed within the office itself is considered to be an office clerical who does not have a close community of interest with production employees. *Id.* at 537. If employees are found to be office clericals, then they must be included in the existing office clerical unit because the Board will not find a segment of office clerical employees to be an appropriate unit and they would not otherwise be included in any other unit. See Austin Cablevision, 279 NLRB 535, 537 (1986); Bank of America, 174 NLRB 101 (1969); Otis Elevator Co., 116 NLRB 262 (1956). If, on the other hand, the nature of their work and other community of interest factors show that the employees at issue are more properly considered plant clericals whose interests are identified with production and maintenance employees, or that they are some other type of employee, then they would not ordinarily be included in a unit of office clericals absent agreement of the parties. See Kroger Co., 204 NLRB 1055 (1973); Mosler Safe Co., 188 NLRB 650 (1971).

involvement.

^{21/} The Board weighs several community of interest factors in determining whether a particular group of employees constitute an accretion to an existing bargaining unit. Such factors are: (1) the integration of the Employer's operations; (2) the centralization of administration and managerial control; (3) geographic proximity; (4) the similarity of working conditions, skills and functions between the employees to be accreted and the employees in the bargaining unit; (5) control over labor relations; (6) the common or separate supervision of the employees to be accreted and the bargaining unit employees; (7) interchange of employees; and (8) bargaining history. See Progressive Service Die Co., 323 NLRB 183, 186 (1997); Pan American Grain Co., Inc., 317 NLRB 442, 447 (1995).

In the instant case, I find that Merchandising Clerks Nancy Bertolozzi,

22/Charmen

22/ The Employer also contends that Nancy Bertolozzi is a statutory supervisor who should be excluded from the unit and the Union takes the opposite position. I find that Bertolozzi is not a statutory supervisor. There is no evidence that she hires, fires, disciplines or evaluates employees. Her assignment of overflow work to other merchandising clerks within the category marketing/procurement is insufficient evidence to establish that she possesses supervisory authority. Thus, her assignment of such work appears to be routine since the record shows that certain merchandising clerks perform certain types of work and that Bertolozzi is delegating the work at the direction of others in order to enable her to complete her own work assignments.

Cardenas, Cheryl Farrow and Alex Silva; Merchandising Secretary Barbara Vela ^{23/} Control Label Secretary Jua Xiong; and Advertising Clerk Trish Flanagan are properly included in the unit as office clericals. Although these employees work in separate locations from other office clerical employees and have separate supervision, I find that they spend most of their work time inputting data into the computer or performing other typical clerical functions such as emptying the fax machine, answering telephones, and scheduling appointments. For example, Bertolozzi spends 90% of her work time inputting items and prices into the computer. Cardenas' primary responsibility is to input data into the computer and she also proof-reads advertisements; empties the fax machine; and distributes materials to the employees in her department. Farrow's primary job is also to input data into the computer. On a weekly basis, Farrow drops off reports to

^{23/} The Employer also contends that Barbara Vela is a confidential employee who must be excluded from the unit and the Union takes the opposite position. I find that Vela is not a confidential employee and cannot be excluded on that basis. Thus, the record shows that Vela works for Category Marketing Manager Steve Peterson and is responsible for typing and filing appraisals on employees in the category marketing department and tracking sick and vacation leave and routing mail. Vela also types forms that initiate pay increases for employees. She has also had access to personnel files kept in Peterson's desk but only when he has occasionally requested her to use such files. She also types memos for Peterson such as those alerting employees to upcoming meetings or performance goals. She did not recall typing disciplinary memos or materials dealing with personnel policies. She testified that Peterson also types his own documents. Based on such facts, I do not find that Vela is a confidential employee. In her five years working for Peterson, Vela recalled only three conversations with him regarding employee conduct. On two occasions, she approached Peterson; once to complain that an employee was too loud and on another to ask if an employee who was absent had contacted him. The third occasion involved Peterson expressing his dissatisfaction with the way an employee dressed and his suggestion to Vela that she give hints to the employee about appropriate attire. I do not find such evidence sufficient to establish that Vela is a confidential employee. The Board's long-established test for determining whether an employee possesses confidential status is whether that employee assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. *NLRB v. Hendricks County Rural* access to documents such as wage and personnel information or her typing of appraisals is not

accounting department employees who are in the unit. Silva spends 75 to 80% of her time inputting ads for Big T Value King and IGA into the computer and proofing sales presentations in the computer. The other 25 to 30% of her time involves handling calls from Super K Mart and handling problems relating to their ads or orders. Vela performs secretarial work for the category marketing department, including answering phones; scheduling appointments; preparing periodic reports; keeping track of vacation schedules; and typing performance evaluations and other personnel documents. Xiong spends about 70% of her time inputting orders from retailers into the computer. She also answers the phone, routes documents, and telephones vendors. She has interactions with accounting department employees in performing her work. Flanagan spends 90% of her time inputting the weekly sales plan and the advertisements generated from that plan into the computer. She spends 10% of her time creating a spread-sheet used by accounting department employees.

In sum, the duties of these seven employees are general office clerical type duties which, although performed in different departments, are not significantly different from those of office clericals who are in the existing unit. Given that their job duties are essentially office clerical in nature and there is little evidence of transfers between these employees and production/maintenance employees at the Employer's facility, I find that they should be included in the existing unit even though they may work in separate departments with different supervisors than unit employees, and have minimal interchange or contact with such clericals. *See Austin Cablevision, supra.*

sufficient to make her a confidential employee. See *Union Oil Co. of California v. NLRB*, 607 F.2d 852 (9th Cir. 1979); *Ernst & Ernst*, 228 NLRB 590 (1977).

On the other hand, I find that Category Marketing Secretary Doris Bertram, Big T/VK Secretary J.R. Ross, Bakery/Deli Department Coordinator Pam Grappo, Retail Pricing Coordinator Karla Maze, Retail Services Coordinator Shelli Porterfield, and Administrative Assistant Mechele Busby should not be accreted to the unit because while their jobs have some office clerical type duties, they are not primarily office clerical in nature and the other community of interest factors do not support their inclusion in the unit. Thus, although Category Marketing Secretary Bertram spends much of her time inputting data into the computer, she is also responsible for administering and monitoring advertising contracts, a task which involves resolving performance problems that arise under such contracts between retailers and vendors. Bertram is separately supervised from unit employees by the Category Marketing/Procurement Manager Steve Peterson. She does not answer telephones, type correspondence or do filing work for anyone. Her contacts are primarily with merchandising/category managers and not with unit employees. In addition, Bertram earns \$16.45 an hour, a rate of pay substantially higher than that of most unit employees.

Big T/VK Senior Department Secretary J.R. Ross has certain clerical duties such as spending 10% of his time inputting data on the computer and typing evaluations and disciplinary notices. However, he also spends much of his time working independently to resolve retailer inquiries about why they have not received deliveries. He also organizes the Employer's yearly golf tournament, negotiating over room rates, banquet fees, etc. and he coordinates the service that provides the exposition facilities for food

shows. During a few days each year, he also visits retail stores of customers and assists them in converting their shelf tags. In sum, the nature of his work is not predominantly office clerical in nature. In addition, Ross is separately supervised from office clerical employees. While he does have contact with unit employees, there is no evidence of interchange between Ross and the office clerical employees in the unit.

Bakery/Deli Sales Coordinator Pam Grappo spends 25 hours a week trying to solicit orders and sell new products to retail bakery and deli managers. In doing so, she is authorized to offer limited price reductions to match competitors' prices. She also makes arrangements with vendors and others for the Employer's semi-annual food show. She is separately supervised by the bakery/deli operations supervisor whom she substitutes for and vice versa. While Grappo has some contact with unit employees, she does not substitute for them and the record discloses no other evidence of interchange between Grappo and office clericals in the unit. The record also discloses that Grappo earns \$14.50 an hour which is a higher rate of pay than that of most unit employees.

Retail Pricing Coordinator Karla Maze has authority to set prices on a weekly basis for about 300 new general merchandise items and to set temporary price reductions. She is separately supervised by Retail Pricing Manager Tafoya but does no typing or filing for Tafoya. Tafoya is in the field about 90% of the time and Maze is the only employee in the retail pricing department. There is no evidence of interchange between Maze and the office clerical employees in the unit.

Retail Services Coordinator Shelli Porterfield provides training and technical support to retailers on the Employer's computer equipment and other hardware such as

scanners, printers, etc. She also maintains the contracts and inventory for such equipment and she spends about 80% of her time on the phone dealing with retailers in connection with such tasks. She also occasionally visits retailer facilities when new equipment is installed. She is in a separate department from unit employees and is separately supervised. She has no regular contact with any employees outside her department.

Meat Department Secretary/Administrative Assistant Mechele Busby spends 40 to 50% of her time on the telephone with retailers doing telemarketing, which is partly order-taking and partly sales and which involves inputting orders into the computer system while speaking to the retailers. The two meat buyers in the department also perform the same function. Busby and other meat department employees also attend to food shows and set up displays and take orders for the meat department. Busby substitutes for meat buyer Rob Morris and has ordered products in his absence. Meat buyers have also substituted for Busby. Busby spends only about 10 to 20% of her time doing secretarial type duties such as preparing correspondence for the head of the meat department and answering phones for employees. While she has had some contact with unit employees, there is no evidence of interchange with them.

In sum, I find that the six employees in these classifications are plant type clericals who do not share a community of interest with unit employees sufficient to warrant their accretion into the unit.

Accordingly, I find that the unit is clarified to include Merchandising Clerks Nancy Bertolozzi, Charmen Cardenas, Cheryl Farrow and Alex Silva; Merchandising

Secretary Barbara Vela; Control Label Secretary Jua Xiong; and Adverstising Clerk Trish Flanagan. Further, the unit is clarified to exclude Category Marketing Secretary Doris Bertram, Big T/VK Senior Secretary J.R. Ross; Bakery/Deli Department Coordinator Pam Grappo; Retail Pricing Coordinator Karla Maze; Retail Services Coordinator Shelli Porterfield; and Adminstrative Assistant Mechele Busby.

ORDER

It is hereby ordered that the the unit is clarified to include Merchandising Clerks Nancy Bertolozzi, Charmen Cardenas, Cheryl Farrow and Alex Silva; Merchandising Secretary Barbara Vela; Control Label Secretary Jua Xiong; and Adverstising Clerk Trish Flanagan. Further, the unit is clarified to exclude Category Marketing Secretary Doris Bertram, Big T/VK Senior Secretary J.R. Ross; Bakery/Deli Department Coordinator Pam Grappo; Retail Pricing Coordinator Karla Maze; Retail Services Coordinator Shelli Porterfield; and Adminstrative Assistant Mechele Busby.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W.,

Washington, D.C. 20570. This request must be received by the Board in Washington,
D.C. by October 29, 1999.

Dated at San Francisco, California, this 15th day of October, 1999.

/s/ Alan B. Reichard

Alan B. Reichard, Acting Regional Director
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